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No. 90-417

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALAN S. KRAMER,

Petitioner,

—v.—

GAINES W. HAMMOND, JR.,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	1
Kramer Raised the Same Constitutional Issue Below	1
The Standard of Proof Below Raises A Due Process Issue	2
Hammond's Conspiracy Theory is Inapposite.	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:	PAGE
Addington v. Texas, 441 U.S. 418 (1979)	3
Dewey v. Des Moines, 173 U.S. 193 (1899)	2
Duignan v. United States, 274 U.S. 195 (1927)	2
Illinois v. Gates, 462 U.S. 213 (1983)	2
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	2
Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981)	1
Milliken v. Meyer, 311 U.S. 457 (1940)	3
Youakim v. Miller, 425 U.S. 231 (1976)	2

Secondary Authorities:

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.24 (6th ed. 1986)	2
Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234 (1983)	3
Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1 (1986)	4
Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506 (1984)	4

STATEMENT

The Brief in Opposition argues the merits of Hammond's claims, and makes three legal arguments not addressed by the petition. First, Hammond accuses Kramer of raising a new constitutional issue for the first time in this Court. Second, he claims that the standard of proof applied by a state court in deciding a Rule 12(b)(2) motion does not raise due process concerns. Third, Hammond asserts a conspiracy theory, which was argued to, but not relied on by, the courts below, as a basis for affirming the decision of the South Carolina Supreme Court. Each of these arguments is without merit.

ARGUMENT

Kramer Raised the Same Constitutional Issue Below

Hammond claims that Kramer is raising for the first time in this Court the appropriate burden of proof on a jurisdiction testing motion. (Brief In Opp., at 21 & n.13.)

Kramer asked the South Carolina Supreme Court to review the entire discovery record, including evidence adduced in opposition to jurisdiction, in deciding whether plaintiff established minimum contacts under the due process clause. By applying a *prima facie* standard to Kramer's 12(b)(2) motion, the court below ignored substantial record evidence showing the absence of minimum contacts. Most courts have improperly held that, even after substantial discovery, "a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion [to dismiss]." *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). The petition asks the Court to correct this erroneous view.

The most that can be said for Hammond's argument is that Kramer did not attach the label "preponderance of evidence" to his argument below. He did, however, ask the court to adopt the standard represented by that label in ruling on his due process claim. Thus, the question presented here was fairly presented below.

Moreover, the leading treatise on practice before this Court states:

> There is . . . a degree of flexibility allowed counsel with respect to the federal questions properly presented to the Court. The parties "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed," and the parties may enlarge upon the questions they do present as long as the enlargement may be deemed fairly included or comprised within the stated questions.

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.24, at 164 (6th ed. 1986) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)). In addition, concurring in *Illinois v. Gates*, 462 U.S. 213 (1983), Justice White plainly recognized a distinction between "the raising of constitutional claims and the making of arguments in support of or in opposition to those claims." *Id.* at 248 (citing and quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)).[1]

The Standard of Proof Below Raises A Due Process Issue

Hammond next argues that "there is no constitutional question presented by the standard utilized by a state court in determining a motion to dismiss . . . ." (Brief in Opp., at 22) This argument is also without merit.

Due process requires that any assertion of state court jurisdiction not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326

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1 Hammond principally relies on *Youakim v. Miller*, 425 U.S. 231 (1976), for his argument on this point. In that case only equal protection grounds were urged by appellants below. In this Court appellants raised an entirely separate constitutional basis—the supremacy clause—to attack a state's federally subsidized foster care payment scheme. Notwithstanding appellant's failure to raise the supremacy clause argument below, this Court entertained the new constitutional claim under the "exceptional cases" doctrine of *Duignan v. United States*, 274 U.S. 195, 200 (1927). The "exceptional cases" doctrine is irrelevant here because Kramer raised a due process claim below, and the petition only raises due process claims.

U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Imposition of procedural rules plainly favoring one party must, if anything does, offend traditional notions of fair play. In circumstances when both parties have engaged in expensive and time consuming discovery, in which evidence supporting and opposing jurisdiction has been adduced, the *prima facie* standard, nevertheless, requires a court to consider only one party's evidence. After substantial discovery, due process can only be satisfied if a court is required to evaluate the evidence of both sides, and determine whether a rational trier of fact could find for a plaintiff on the jurisdictional issue. Due process requires a level playing field, and the *prima facie* standard tilts the field for a plaintiff. This is fundamentally unfair.

Moreover, under Hammond's analysis a state court would be given absolute discretion to impose any standard of proof it chose, presumably even less than *prima facie* proof, in deciding a pretrial motion raising issues under the due process clause. This assertion is wrong. As this Court recognized in *Addington v. Texas*, 441 U.S. 418 (1979), the standard of proof used by a state court in resolving constitutional claims raises a fourteenth amendment due process issue.

Hammond's Conspiracy Theory is Inapposite

Apparently recognizing the constitutional inadequacy of the opinion below, Hammond seeks to justify the result reached by the South Carolina Supreme Court on a conspiracy theory.[2] The petition asserts that Kramer failed to pur-

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2 While the South Carolina Supreme Court upheld long-arm jurisdiction over Kramer on Hammond's mere allegations of conspiracy (388 S.E.2d at 798, App. to Pet. for Cert., at 5a), its due process analysis did not rely on a conspiracy theory. (388 S.E.2d at 798-99, App. to Pet. for Cert., at 5a-6a.)

This Court has never adopted a conspiracy theory of personal jurisdiction. Moreover, the constitutional legitimacy of jurisdiction based on conspiracy has been questioned in a number of recent articles. *See* Althouse, *The Use of*

posefully direct activities at South Carolina in a manner sufficient either to invoke the benefits and protections of South Carolina law, or to reasonably anticipate litigation in South Carolina. (Pet. for Cert., at 20-25.) Thus, traditional minimum contacts could not be established. Recognizing that minimum contacts cannot be found on contacts proximately resulting from actions by Kramer himself, Hammond seeks to supply the missing "minimum contacts" by his conspiracy theory: ". . . Kramer engaged in a series of activities over a several month period of time, which involved him working with South Carolinians (who were located in South Carolina) in a scheme directed at another South Carolinian." (Brief in Opp., at 17.)

Hammond made the same arguments in both the trial court and the South Carolina Supreme Court. Neither court below relied on Hammond's conspiracy theory in upholding personal jurisdiction over Kramer. There is a compelling reason why the courts below failed to adopt Hammond's conspiracy theory. Hammond metaphysically created a conspiracy that is not supported by a scintilla of evidence adduced during a year of discovery. The claim is pure fiction. It is based on innocent facts to which Hammond attributes sinister motives and is wholly grounded on unsupported inferences. Hammond failed even under the weak *prima facie* standard to convince the courts below that his conspiracy claim, which he repeats here, was sufficiently credible to support due process.[3]

Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis, 52 Fordham L. Rev. 234 (1983); Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1 (1986); Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506 (1984).

3 Only a complete review of the Transcript of Record before the South Carolina Supreme Court could reveal the full scope of Hammond's misleading statements. We reluctantly burden the Court with a few examples of

The petition asks this Court to review the decision and opinion of the South Carolina Supreme Court. Hammond's conspiracy theory obfuscates this request. The conspiracy theory need not be addressed by this Court to decide the issues presented. Notwithstanding Hammond's arguments, the national importance and substantiality of the questions presented cannot be denied.

Hammond's misleading statements. These examples alone establish that the Brief In Opposition lacks credibility.

First, Hammond claims that Kramer drafted a subscription agreement with Evins allocating Hammond 70% of the company. (Brief In Opp., at 2.) The drafts in the record prove precisely the contrary. Kramer prepared a draft subscription agreement leaving blank spaces for the names and number of shares to be allocated to subscribers (R. 82, 587), and by letter requested his clients and Hammond's counsel to fill in the blanks. (R. 487, 1088.)

Second, Hammond claims that Kramer lied to him to induce him to sign the subscription agreement. (Brief In Opp., at 2-3) Hammond's own deposition testimony established that Hammond did not talk to Kramer during the period in which any such inducement could have occurred. (R. 454-55) Moreover, Hammond admitted that he approved stock for Kramer after discovering the alleged misstatements of Evins. (R. 449.)

Third, Hammond claims that Kramer acted as his lawyer. (Brief In Opp., at 2 n.2, 10 ¶ "3") In his state court action in New York, however, Hammond admitted that Kramer did not act as his lawyer. There Hammond claimed that Kramer acted as lawyer for the proposed Delaware corporation. (Kramer's South Carolina Sup. Ct. Reply App., at R-25, containing an excerpt from Hammond's New York papers.)

Fourth, Hammond claims that Kramer caused the option to lapse. (Brief In Opp., at 8-9) It is undisputed that the option could not be exercised without the proceeds of the Michael Reese closing, and that the Michael Reese contract required a letter of credit. (R. 52-53, 256, 695-700.) Documentary evidence in the record establishes that Wallace would not release the letter of credit without Hammond's guarantee, which Hammond declined to provide. (R. 264, 356, 426.)

Fifth, Hammond claims that Kramer and Evins masterminded a conspiracy to reduce his interest by 60,000 shares. But Hammond admits that Kramer and Evins received only 18,000 shares. This fact alone undermines the credibility of his claims.

CONCLUSION

For the reasons stated, the Brief in Opposition is without merit, and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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